85-1009

NO.

Supreme Court, U.S.
FILED
DEC 5 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JOHN YARBOUGH and JUDY WILSON SMITH,
a/k/a JUDY YARBOUGH,

Petitioners,

v.

STATE OF NEW JERSEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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Question Presented for Review

Are judicially created sentencing criteria, which are based upon the New Jersey Supreme Court perception of broad issues of public policy regarding criminal penalties, violative of the constitutional principle of separation of powers?

Parties

Petitioners-defendants-respondents in the court below are John Yarbough and Judy Wilson Smith, also known as Judy Yarbough.

Respondent-plaintiff-appellant in the court below is the State of New Jersey.

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STATE OF NEW JERSEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

Petitioners, John Yarbough and Judy Wilson Smith respectfully petition this Court, pursuant to 28 U.S.C. Sec 1257(3) and Rule 19 of the Rules of this Court for a Writ of Certiorari to the New Jersey Supreme Court, in the case of *State of New Jersey* v. *John Yarbough and Judy Wilson Smith, also known as Judy Yarbough*, —— N.J. ——, —— A2d —— (1985).

Opinions Below

The opinion of the Supreme Court of New Jersey is reported at —— N.J. ——, —— A2d —— and is set forth in Appendix A attached hereto. The per curiam decision of the Superior Court of New Jersey, Appellate Division issued on July 16, 1984, is reported at 195 N.J. Super 135 and is set forth in Appendix B attached hereto.

Jurisdiction

The judgment of the New Jersey Supreme Court was entered on October 7, 1985. This Court has jurisdiction under 28 U.S.C. Sec. 1257(3) to review the final judgment of the New Jersey Supreme Court, which is the "highest court of [New Jersey] in which a decision could be had . . ."

Constitutional Provisions Involved

This case involves the constitutional doctrine of separation of powers as well as the Due Process Clause of the Fourth Admendment which together prohibit State Courts from depriving persons of liberty or property as punishment for criminal conduct except to the extent authorized by State law.

This case also involves the rule of statutory construction known as lenity which prohibits the Courts, absent an appropriate legislative history, from interpreting a criminal statute so as to increase the penalty which the statute places on a particular individual.

Statement of the Case Presented

After indictment and a trial by jury, Petitioners were each convicted of three counts of aggravated sexual assault upon Petitioner Smith's eleven year old daughter, Kimberly, three counts of endangering the welfare of a child, two counts of conspiracy, and four counts of hindering apprehension by concealment and by giving false information.[1]

Petitioner Yarbough was originally sentenced by the trial judge on the aggravated sexual assault convictions to three consecutive 20 year terms, each with a 10 year ineligibility period.[2] On the hindering apprehension con-

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[1] Although each Petitioner was originally charged with nineteen separate counts of crime, the three counts of endangering the welfare of a child and the two conspiracy counts were merged with the substantive offenses for the purpose of sentencing. Three weapons related offenses were dismissed by the State during the trial. Therefore, at the time of sentencing, each stood to be sentenced for three counts of aggravated sexual assault and four counts of hindering apprehension.

[2] Under State law, aggravated sexual assault is a crime of the first or most serious degree, carrying with it a specific term of years between 10 and 20 years, as fixed by the court.

Additionally, N.J.S. 2C:43-6 provides the standards for imposing a period of parole ineligibility as follows:

> b. As part of a sentence for any crime where the court is clearly convinced that the aggravating factors substantially outweigh the mitigating factors, as set forth in subsections a. and b. of 2C:44-1, the court may fix a minimum term not to exceed one-half of the term set pursuant to subsection a., or one-half of the term as set pursuant to a maximum

(Footnote continued on following page)

victions, he was sentenced to four 4 year terms, each with a 2 year period of parole disqualification, two were imposed consecutive to each other, with the other two to run concurrently.[3] Petitioner Yarbough's original sentences therefore aggregated 68 years with 34 years of parole ineligibility.

On her aggravated sexual assault convictions, Petitioner Smith was sentenced to three consecutive custodial terms of 15 years, each with a 7 year period of parole ineligibility. On each of the four hindering apprehension charges she was sentenced to a 4 year term, with 2 years of parole ineligibility, all concurrent with each other and with the aggravated sexual assault sentences. Petitioner Smith's original sentence therefore aggregated 45 years with 21 years of parole ineligibility.

Both Petitioners challenged their sentences in the Superior Court of New Jersey, Appellate Division, as excessive and grossly disproportionate to the seriousness of the crimes for which they were committed. Reviewing both sentences under the guidelines established by the New Jersey Supreme Court in *State* v. *Hodge*, 95 N.J. 369

(Footnote continued from preceding page)

> period of incarceration for a crime set forth in any statute other than this code, during which the defendant shall not be eligible for parole provided that no defendant shall be eligible for parole at a date earlier than otherwise provided by the law governing parole.

[3] Hindering apprehension is graded as a crime of the third degree, carrying a specific term of years "which shall be fixed by the court and shall be between 3 and 5 years." N.J.S. 2C:43-6(a)(3).

(1984) and *State* v. *Roth*, 95 N.J. 334 (1984), the Appellate Division in a unanimous opinion issued on August 9, 1984 (Petitioners' Appendix B), ruled that both sentences were excessive and "clearly unreasonable so as to shock our conscience", 195 N.J. Super at 144, 146. Exercising its original jurisdiction for purposes of resentencing[4], the Appellate Division resentenced Petitioner Yarbough to an aggregate sentence of 24 years with 12 years of parole ineligibility and Petitioner Smith to an aggregate sentence of 19 years with 7 years of parole ineligibility. 195 N.J. N.J. Super at 147-150. The gravamen of the Appellate Division's sentence modifications, i.e., the elimination of the consecutive component of the aggravated sexual assault sentences, was based upon the Appellate Court's unanimous view that:

> Surely the repetitive nature of the assaults should play a significant role in the sentencing decision. But each repetition of the assault does not justify a separate and additional penalty. *Not only is it entirely fortuitous how many individual events can be proved, but more importantly each repetition of the offense cannot be said to evidence a further criminal purpose of an enhanced criminal risk warranting a full measure of additional penalty.* (App. B, 41a) (Emphasis supplied.)

The New Jersey Supreme Court granted the State's petition for certification to review the question of consecutive sentencing standards under the New Jersey Code of Criminal Justice.[5] 99 N.J. 195 (1984).

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[4] New Jersey Rules of Court, R. 2:10-5, see N.J.S. 2C:44-7.

[5] N.J.S. 2C:1-1, *et seq.*

The New Jersey Supreme Court, noting that the State's Code of Criminal Justice was entirely silent regarding sentencing standards in multiple offense situations[6], examined the statutory sentencing guidelines of California, Illinois, Minnesota, Washington, Oregon, Tennessee and New York, and adopted for New Jersey the following criteria, which are reflected in varying degrees in the statutes of said jurisdiction:

> (1) there can be no free crimes in a system for which the punishment shall fit the crime;
>
> (2) the reasons for imposing either a consecutive or concurrent sentence should be separately stated in the sentencing decision;
>
> (3) some reasons to be considered by the sentencing court should include facts relating to the crimes, including whether or not:
>
> (a) the crimes and their objectives were predominantly independent of each other;
>
> (b) the crimes involved separate acts of violence or threats of violence;

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[6] N.J.S. 2C:44-5a states only that

> multiple sentences shall run concurrently or consecutively as the court determines at the time of sentence.

N.J.S. 2C:1-2C states that

> discretionary powers conferred by the code shall be exercised in accordance with criteria stated in the code and, insofar as such criteria are not decisive, to further the general purposes . . .

of the code.

(c) the crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior;

(d) any of the crimes involved multiple victims;

(e) the convictions for which the sentences are to be imposed are numerous;

(4) there should be no double counting of aggravating factors;

(5) successive terms for the same offense should not ordinarily be equal to the punishment for the first offense; and

(6) there should be an overall outer limit on the culmination of consecutive sentences for multiple offenses not to exceed the sum of the longest terms (including an extended term, if eligible) that could be imposed for the two most serious offenses.

We adopt these criteria as general sentencing guidelines for concurrent or consecutive sentencing decisions (including any parole ineligibility features) when sentence is pronounced on one occasion on an offender who has engaged in a pattern of behavior constituting a series of separate offenses or committed multiple offenses in separate, unrelated episodes . . . . (App. A, 19a, 21a).

Because the standards adopted by the New Jersey Supreme Court were "not evident" prior to its decision in this case, the Court remanded the matter back to the trial Court for resentencing in accordance with the new standards. (App. A, 23a-24a).

REASONS FOR GRANTING THE WRIT

A. The Court below usurped a clearly legislative function in adopting new rules for sentencing in New Jersey.

Petitioners submit that the specific criteria adopted by the Court below are so legislative in character and purport to resolve so broad a spectrum of public policies and issues as to constitute an impermissible invasion of the legislative function and a violation of the constitutional doctrine of separation of powers. The following two criteria adopted by the Court below are most highly illustrative of Petitioners' objections:

> (1) there can be no free crimes in a system for which the punishment shall fit the crime; (App. A, 19a)
>
> * * *
>
> (6) there should be an overall outer limit on the cumulation of consecutive sentences for multiple offenses not to exceed the sum of the longest terms (including an extended term, if eligible) that could be imposed for the two most serious offenses.

When viewed against an existing statutory framework which is silent regarding both the decision to make multiple sentences concurrent or consecutive to one another and the actual length or severity of individual and cumulative sentences, the Court below has by judicial fiat purported to resolve broad social issues regarding fair and uniform punishment for criminal behavior.

Twenty-eight years ago, in the case of *Gore* v. *United States*, 357 U.S. 386 (1958), Justice Frankfurter noted for the Court that "[w]hatever views may be entertained regarding severity of punishment, whether one believes in its efficacy or its utility, . . . these are peculiarly questions of legislative policy". Likewise, and more recently, this Court has reaffirmed the principle that decisions regarding the limits of the exercise of sentencing discretion should be made by the Legislatures, not the Courts. *Rummel* v. *Estelle*, 445 U.S. 263 (1980). Notwithstanding these established rules, in the present matter the New Jersey Supreme Court has decided for all of the citizens of New Jersey that consecutive sentences should ordinarily be imposed in multiple offense cases, and the Court has further defined precisely what the numerical "cap" should be on the aggregate sentence in all such cases. The Petitioners submit that the Court below has clearly invaded the legislative prerogative by issuing these specific sentencing directives which are applicable not only to Petitioners' convictions, but to an entire class of criminal offenses.

The New Jersey Legislature's failure to provide standards for the imposition of consecutive sentences led, in this case, to sentences imposed upon Petitioners by the trial Court which were, by any standards, unconscionable. The Appellate Division of the New Jersey Superior Court later recognized the tragic disparity between Petitioners' original sentences and all other sentences in comparable cases during 1983:

> We requested the Administrative Office of the Courts to compile records of recent sentences in comparable cases. Those records disclose that 38

> persons were sentenced in 1983 for first-degree aggravated sexual assault where the victim was 13 years old or less. In 31 of those cases, multiple assaults had apparently occurred, yet in only 3 were multiple convictions entered; only in the present case were consequtive sentences imposed for separate assaults on the same victim. Moreover, of the 38 persons thus sentenced only 12, including Yarbough and Smith, were given parole ineligiblity terms; with one exception, the other parole ineligibility terms were less than 10 years. The one excepted person was convicted of three separate rapes of two young children to whom he was a stranger; his conduct was found to be "characterized by a pattern of repetitive, compulsive behavior" (N.J. S.A. 2C:47-3 (a) and he was sentenced to a 25 year parole ineligibility term.
>
> Sentences imposed in other cases are, of course, not a certain guide since the circumstances framing each sentence are unique. But in the effort to assure a predictable degree of uniformity in sentencing (Hodge, supra, 95 N.J. at 379), we ought to consider the evidence of sentencing patterns available to us. Cf. Solem v. Helm, 463 U.S. 277, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983). That evidence confirms our view that the aggregate sentences here are unreasonable and excessive. (App. B, 42a-43a).

The Appellate Division's solution to the sentencing disparity before it was an appropriate judicial response—the Court exercised its statutory sentencing jurisdiction and resentenced these Petitioners to modified yet substantial

concurrent sentences, taking account of their lack of a prior criminal history. The Appellate Division correctly did not attempt to legislate by drafting a new sentencing law; instead the Court noted that:

> . . . judges must exercise careful, common sense discretion in imposing punishment for . . . multiple offenses in order to ensure that the pyramiding of sentences does not offend notions of fairness or cruel and unusual punishment. (App. B, 40a).

By reason of the New Jersey Supreme Court's legislative "gloss" upon the sentencing provisions of the Code which occurred in this case, the rules for sentencing in New Jersey are now changed.[7] Concurrent sentences in multiple offense cases have not only been legally valid, such sentences have been the rule in situations similar to the facts of the present case. There has never been a statute or written case decision which creates a *presumption* in favor of consecutive sentencing, yet the New Jersey Supreme Court has created exactly such a presumption in this case. The mandate of the Court below that "there can be no free crimes in a system for which the punishment shall fit the crime" leaves little room for the imposition of concurrent sentences in multiple offense cases, yet the Legislature has never "weighted" the sentencing statute to favor one form of sentencing over another. See footnote 6, *supra*. Concurrent sentences, which run at the same time as other sentences usually imposed for related crimi-

[7] The New Jersey Courts have long recognized that the discretionary power to impose consecutive sentences is not founded upon statute, but rather upon common law and common sense. *State* v. *Maxey*, 42 N.J. 62, 64-65 (1964).

nal conduct, are by definition, "free" in the sense that they do not result in an increase in the aggregate custodial sentence. However, prior to the decision by the Court below, the New Jersey Courts have uniformly favored concurrent sentencing:

> The general rule is that separate sentences imposed by a single New Jersey court will run concurrently unless the sentencing judge clearly directs that they be served consecutively. See State v. Williams, 29 N.J. Super 309, 313 (App. Div. 1954), certif. den. 348 U.S. 847, 75 S. Ct. 71, 99 L. Ed. 668 (1954). The same rule applies to the imposition of separate sentences, at separate times, by more than one New Jersey court. See State v. Corbitt, 147 N.J. Super 195, 199 (Law Div. 1977).[8]

It was this long history of the doctrine of "presumptive concurrence" which led the Appellate Division to modify the sentences of these Petitioners, as first offenders. Yet these same Petitioners, whose criminal conduct occured some three years prior to the decision of the New Jersey Supreme Court, are now faced with new sentencing rules which clearly favor consecutive sentencing and which also clearly jeopardize the enlightened, humanitarian and fair sentencing result achieved by the Appellate Division.

This Court has heretofore declared that new "trends" towards any specific new sentencing patterns or rules should find their source and their sustaining force in the

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[8] The Federal Courts in New Jersey have also generally followed the rule of "presumptive concurrence" in sentencing. *U.S.* v. *Harrison,* 156 F. Supp. 756 (D.C. N.J. 1958).

Legislatures, and not in the Courts. *Rummel v. Estelle*, *supra*. This case represents both a violation of that principle and an illustration of the dangers of a Court legislating in the face of an existing criminal Statute which does not support the decision of the Court below in any way. The criminal law and sentencing patterns in New Jersey cannot be dictated to the citizens by a seven member Court. These are sensitive and changing social concerns which have always and should continue to be addressed by the State Legislature. By virtue of the violation of the constitutional prinicples of separation of powers which occurred in this case, the Writ should be granted, the decision of the New Jersey Supreme Court should be vacated, and the sentences imposed by the Appellate Division reinstated.

B. The unforseeable and unsupported decision of the New Jersey Supreme Court regarding sentencing criteria under State law does not preclude review by this Court.

Although the decision of the Court below purports to deal only with a State criminal Statute, this Court has long held that where a judicial construction of a criminal Statute is unexpected or not supported by reference to prior existing State law, it must not be given retroactive effect. *Bouie* v. *Columbia*, 378 U.S. 347 (1964). In *Bouie*, the Court explained the constitutional bar to retroactivity in these situations:

> . . . Indeed, an unforseeable judicial enlargement of a criminal statute, applied retroactively, operates

> precisely like an ex post facto law, such as Art. I, §10, of the Constitution forbids. An ex post facto law has been defined by this Court as one "that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action," or "that *aggravates* a crime, or makes it greater than it was, when committed." (Citations omitted) (Emphasis in original). If a state legislature is barred from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction. 378 U.S. at 353-4.

There is no room to dispute that the Petitioners, having received reductions in their aggregate sentences by the Appellate Division,[9] are now exposed to the risk of substantial sentence increases pursuant to the ruling of the New Jersey Supreme Court. Since both of the Appellate Division sentences were less than the maximum permitted under the New Jersey Supreme Court standards, each Petitioner now faces a maximum aggregate sentence of 40 years with a 20 year parole disqualifier. A maximum sentence for Yarbough would result in an 8 year increase in the period of parole disqualification, and a maximum sentence for Smith would result in a 13 year increase in the period of parole disqualification.

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[9] Yarbough's sentence was reduced from 68 years with 34 years of parole ineligibility to 24 years with 12 years of parole ineligibility.

Smith's sentence was reduced from 45 years with 21 years of parole ineligibility to 19 years with 7 years of parole ineligibility.

Where the underlying criminal Statute is completely silent and at best ambiguous regarding the standards to be followed in making the consecutive/concurrent decision, this Court has in the past refused to endorse a statutory interpretation that increases criminal penalties, since any such interpretation can only be based upon a "guess" as to what was intended by the Legislature. *Albernaz* v. *United States*, 450 U.S. 333 (1981). This so-called "rule of lenity" has been said to have a special significance when a Court must determine the extent of criminal punishment:

> In this context, the principle is at corollary of the rule of lenity, an outgrowth of our reluctance to increase or multiply punishments absent a clear and definite legislative directive. *Simpson* v. *United States*, 435 U.S. 6, 15 (1978).

This is a case of statutory silence, supplanted by a judicially created set of sentencing criteria which, taken collectively, may well increase the Petitioners' aggregate jail terms. Not only do said criteria represent a judicial usurpation of clearly legislative powers and functions; but the retroactive application of said criteria to the past alleged behavior of these Petitioners works the injustice of an ex post facto law. The decision of the New Jersey Supreme Court must be vacated and the sentences imposed by the Appellate Division reinstated.

CONCLUSION

For all the foregoing reasons, this Court should grant the Writ of Certiorari to the New Jersey Supreme Court. Petitioners respectfully submit that the decision of the New Jersey Supreme Court should be vacated, and the sentences imposed by the Appellate Division reinstated.

Respectfully submitted,

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Dated: December 5, 1985

APPENDIX

Opinion of the Supreme Court of New Jersey

SUPREME COURT OF NEW JERSEY

A-132 September Term 1984

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

JOHN YARBOUGH and JUDY WILSON SMITH, a/k/a JUDY YARBOUGH,

Defendants-Respondents.

Argued May 7, 1985—Decided October 7, 1985

On certification to the Superior Court, Appellate Division, whose opinion is reported at 195 N.J. Super., 135 (1984).

Catherine A. Foddai, Deputy Attorney General, argued the cause for appellant (*Irwin I. Kimmelman,* Attorney General of New Jersey, attorney).

Richard J. Kaplow argued the cause for respondents (*Weinberg and Kaplow,* attorneys).

The opinion of the Court was delivered by O'Hern, J.

This is the first time that we have addressed the standards under the Code of Criminal Justice, N.J.S.A. 2C:1-1 to 98-4 (Code), that shall govern courts in determining whether sentences for multiple offenses are to be served consecutively or concurrently. We determine that in fashioning consecutive or concurrent sentences under the Code, sentencing courts should be guided by the Code's paramount sentencing goals that punishmment fit the crime, not the criminal, and that there be a predictable degree of uniformity in sentencing. To achieve these goals, we outline specific standards that shall generally guide courts in comparable cases in the exercise of such sentencing discretion. In our review of the sentencing procedures below, we determine that the sentences imposed by the courts below were not consistent with the standards we anounce today. We remand the case for sentence in accordance with these standards.

I

The facts of this case are sordid. They have been set forth in detail in the opinion below. 195 N.J. Super. 135 (App. Div. 1984). We repeat only those facts essential to disposition. The two defendants, Judy Wilson Smith and John Yarbough, were convicted by an Essex County jury on three counts of aggravated sexual assault upon Smith's eleven-year-old daughter, Kimberly, in violation of N.J.S.A. 2C:14-2a., committed between June 1, 1982, and August 17, 1982. Defendants were also convicted of trying to cover up these crimes by giving false information and otherwise act-

ing to hinder their apprehension in violation of N.J.S.A. 2C:29-3b.[1]

In the late spring or early summer of 1982, Kimberly arrived from Chicago to live with her mother, Judy Smith, and her mother's male companion, John Yarbough, in an apartment they occupied together in East Orange, New Jersey. From the date of her arrival, she was sexually abused. What is so incredibly shocking about this case is the callousness of the crimes. Unlike other situations in which the sexual abuse of a child by one in parental authority is concealed from the other, these defendants were partners in crime. In the three separate periods that were testified to, Smith not only did not intervene on behalf of her child, she on occasion condoned the abuse with mocking questions. When the sexual abuse was revealed through Kimberly's confidences in a friend, Smith went so far as to threaten Kimberly's life. Both tried to send the victim back to Chicago to cover up the crimes, but Kimberly was returned to New Jersey and defendants were convicted of the crimes for which they were charged.

Each stood to be sentenced on the three counts of aggravated sexual assault and the four counts of hindering

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[1] Defendants were actually charged with nineteen counts of crime. Three weapons-related counts were dismissed at trial. Two conspiracy counts were merged with substantive offenses. Three counts of endengering the welfare of Kimberly were merged for sentence with the aggravated sexual assaults. Both defendants were separately charged with giving false information and otherwise acting to hinder the apprehension of themselves and the other. Hence, each stood to be sentenced for three counts of aggrevated sexual assault and four counts of hindering apprehension.

apprehension. Their conduct would test the capacity of the most resolute of judges to focus on the Code's grading of the crime and not the criminal in fashioning a sentence. Yet that is one of the central goals that we have set for ourselves in defining sentencing standards under the Code. *State* v. *Hodge*, 95 N.J. 369, 376-77 (1984). The crimes of which they were convicted were of two grades. N.J.S.A. 2C:14-2a. (1) makes sexual penetration of a child of these years a first-degree crime without regard to the use of force. (The supervisory relationship of these defendants with the child would have made it a first-degree crime also as to a victim under sixteen. N.J.S.A. 2C:14-2a.(2)(b)). As a crime of the first degree, the offense is the most serious, with the exception of murder, in the Code.[2] It warrants the highest range of punishment under the Code—up to twenty years imprisonment with a ten-year parole disqualifier. N.J.S.A. 2C:43-6a.(1). The range of sentence for the third-degree offenses of hindering apprehension is between three and five years, with a possible parole disqualifier of one-half the sentence imposed. N.J.S.A. 2C:43-6a.(3); N.J.S.A. 2C:43-6b.

Following conviction in 1983, defendant Yarbough was sentenced on the three counts of aggravated assault to three consecutive maximum twenty-year terms of imprisonment, with consecutive ten-years terms of parole ineligibility, and on each of the four hindering-apprehension counts, to four-year terms of imprisonment with parole

---

[2] There are separate sentencing terms for murder and kidnapping. N.J.S.A. 2C.11-3b.; 13-1c.; *see State* v. *Serrone*, 95 N.J. 23 (1983).

disqualifiers of two years. Two of the hindering-apprehension sentences were made consecutive to each other and to the sentences imposed on the sexual-assault counts. Two were made concurrent to each other and to the sentences imposed previously. Yarbough was also fined $8,300 made payable to the Violent Crimes Compensation Board. His aggregate sentence was sixty-eight years imprisonment with a minmum parole ineligibility of thirty-four years.

Defendant Smith was sentenced on the three aggravated-sexual-assault charges to consecutive fifteen-year terms with consecutive seven-year periods of parole ineligibility, and on the four hindering-apprehension charges, to four four-year terms with parole disqualifiers of two years. These sentences were made concurrent to each other and to the terms imposed on the sexual-assault charges. Smith was also fined $1,500 and penalized a total of $1,700, made payable ot the Violent Crimes Compensation Board. Smith's aggregate sentence was thus forty-five years imprisonment with a parole ineligibility period of twenty-one years.

On appeal, the Appellate Division, in an unreported opinion, affirmed their convictions, but remanded the matter to the trial court to consider the sentences imposed in light of our decisions in *State* v. *Hodge, supra,* 95 N.J. 369, and *State* v. *Roth,* 95 N.J. 334 (1984), which were announced on February 7, 1984. Following two sentencing hearings, the trial court modified the sentences for each defendant by reducing the first of the sexual assaults to fifteen years with a five-year parole disqualifier. As modified, Yarbough's aggregate sentence was sixty-three years imprisonment with a parole disqualifier of twenty-nine years, and Smith's aggregate sentence was forty-five years imprisonment with a parole disqualifier of nineteen years.

On defendants' further appeal, the Appellate Division concluded that the trial court had incorrectly addressed the aggravating and mitigating factors specified in N.J.S.A. 2C:44-1a. and b. 195 N.J. Super. at 142-44. It found that the court had invoked as aggravating factors facts that the Legislature had incorporated into the Code as part of the original grading of the offense, for example, that the crime involved an eleven-year-old child and that the defendants had betrayed their position of responsible trust for the child. Under the Code, the Legislature has already incorporated these factors in rating the crime as one of the first degree. Aggravating and mitigating factors other than the crime itself are to be weighed under N.J.S.A. 2C:44-1f.(1) in order to arrive at an appropriate sentence within the maximum/minimum range specified in N.J.S.A. 2C:43-6a. for each degree of crime. A list of the applicable aggravating and mitigating factors, other than the crime itself, is contained in N.J.S.A. 2C:44-1a. and b. On balance, depending on the preponderance of aggravating or mitigating factors, the court may impose a sentence within the maximum and minimum range provided for the degree of the offense. If "clearly convinced" that the aggravating factors outweigh the mitigating factors, the court may also impose a period of parole ineligibility pursuant to N.J.S.A. 2C:43-6b.

Because appellate review of sentencing requires that the trial court apply correct legal standards in imposing sentence, the Appellate Division concluded that the sentences could not be sustained. Because it had specifically remanded the matter to the sentencing court to exercise its discretion in accordance with the Code's standards, the court declined

to remand the matter again and instead exercised original jurisdiction. Although recognizing that sentences in other cases are not a certain guide, the Appellate Division examined recent sentences in comparable cases and, in an effort to assure a predictable degree of uniformity in sentencing, it considered such sentencing patterns to be a confirmation of its view that the aggregate sentences imposed here were excessive.

As to defendant Yarbough, for the aggravated sexual assaults, the court reimposed the twenty-year term with a ten-year parole disqualifier on the first sexual-assault charge. However, the sentences imposed on the two remaining sexual charges were made concurrent to each other and to the sentence imposed on the first assault. On the hindering-apprehension counts, on one count the Appellate Division imposed a four-year term with a parole ineligibility of two years, and the sentence was made consecutive to the sentences imposed for the sexual assaults. On the remaining hindering counts, the Appellate Division imposed concurrent four-year terms with two-year parole disqualifiers concurrent to the terms imposed on the sexual-assault counts. Thus, defendant Yarbough's sentence was an aggregate of twenty-four years with twelve years of parole ineligibility.

With regard to defendant Smith, the Appelate Division reduced the sentence imposed for the aggravated sexual assaults to concurrent fifteen-year terms of imprisonment with concurrent five-year parole disqualifiers. On the hindering-apprehension counts, the Appellate Division imposed one four-year term with a two-year parole disquali-

fier made consecutive to the aggravated-sexual-assault sentences. On the remaining hindering counts, the court imposed concurrent four-year terms with two-year parole disqualifiers concurrent to the terms previously imposed. Smith's sentence was an aggregate of nineteen years with seven years of parole ineligibility.

We granted the State's petition to review the question of consecutive-sentencing standards under the Code of Criminal Justice. 99 N.J. 195 (1984).

II

The paramount goal of sentencing reform was greater uniformity. *State* v. *Roth, supra,* 95 N.J. at 361. As noted, to that end, the Code channels the discretion of sentencing judges in fixing the terms of sentences for offenses under that Code. In *State* v. *Roth, supra,* 95 N.J. at 341-56, we reviewed in detail the development of the sentencing standards under the Code. In its structure, the New Jersey Code establishes a scheme of "presumptive sentencing." Under that scheme, the Legislature has broken crimes down into sub-categories, established degrees of severity, determined how much the presumptive first-offender's sentence would be increased for succeeding convictions, defined specific aggravating or mitigating factors, and provided that "'[o]nly in truly extraordinary and unanticipated circumstances would the judge be permitted to deviate from the presumptive sentence *beyond* the narrow range permitted by an ordinary finding of aggravating or mitigating factors.'" *State* v. *Roth, supra,* 95 N.J. at 355 (quoting the Twentieth Century Fund Task Force on Criminal Sentenc-

ing, *Fair and Certain Punishment* 21 (1976) (emphasis in original) [hereinafter cited as *Fair and Certain Punishment*]).

Our Code resembles a model for sentencing based on notions of proportionality and desert. The model has two main features: first, the primary criterion for the severity of punishment is the gravity of the defendant's crime; second, sentencing discretion is regulated through standards that prescribe the quantum of punishment for different species of criminal conduct. For each gradation of seriousness, a normally-recommended sanction is set. Offenders convicted of crimes of that gravity will ordinarily receive that quantum of punishment. The Code requires the sentencing court to look at the individual offender in balancing the defined aggravating and mitigating factors (including the defendant's prior record, cooperation, or the likelihood of further criminal conduct) to determine the range of the sentence, a parole disqualifier, or an extended term. N.J.S.A. 2C:43-6a. and b.; 2C:43-7; and 2C:44-1f. (The Graves Act, N.J.S.A. 2C:43-6c. and d., prescribes certain mandatory terms for defined weapons offenses.)

The Code does not define with comparable precision the standards that shall guide sentencing courts in imposing sentences of imprisonment for more than one offense. With certain narrow exceptions, the Code states only that "multiple sentences shall run concurrently or consecutively as the court determines at the time of sentence". N.J.S.A. 2C:44-5a. In general, "discretionary powers conferred by the code shall be exercised in accordance with the criteria stated in the code and, insofar as such criteria are not

decisive, to further the general purposes * * *" of the Code. N.J.S.A. 2C:1-2c.

There being no specific criteria stated in the Code, we must fashion standards for discretion that will best further the purposes of the Code.[3] Those purposes center upon the concept that punishment of crime be based primarily on principles of deserved punishment in proportion to the offense and not rehabilitative potential, and that in dispensing that punishment, our judicial system should attain a predictable degree of uniformity. Our standard for imposing consecutive sentences should be consistent with those goals.

III

To place the problem in perspective, it is necessary to recall briefly the history of sentencing that we reviewed in *State* v. *Roth, supra,* 95 N.J. at 345-56. Under prior law, sentencing theory reflected the viewpoint that reformation

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[3] Our pre-Code decisional law did not set standards for consecutive sentences. *State* v. *Maxey,* 42 N.J. 62, 65 (1964), mainly noted that our courts have the discretion and power to impose consecutive sentences for terms of years, citing *State* v. *Mahaney,* 73 N.J.L. 53 (Sup. Ct. 1905), aff'd, 74 N.J.L. 849 (E. & A. 1907). At common law, since death was the penalty for all felonies, "there was * * * no rational point, once having sentenced a man to death, to direct that he be hanged a second time." *State* v. *Maxey, supra,* 42 N.J. at 65. Other decisions on consecutive sentences, while sustaining the power of imposition, did not discuss the standards. *State* v. *Roleson,* 14 N.J. 403, 409, *cert.* den., 347 U.S. 947, 98 L.Ed. 1095 (1954); *State* v. *Vance,* 112 N.J. Super. 479, 481 (App. Div. 1970); *State* v. *Cox,* 101 N.J. Super. 470, 476 (App. Div. 1968), *certif.* den., 53 N.J. 510 (1969).

and rehabilitation of offenders was a major goal of criminal sentencing. Under that mold, proponents of sentencing based on rehabilitation advocated a presumption in favor of concurrent sentencing to facilitate the reform of the defendant. The Legislature merely set maximum and minimum terms. The court would impose a sentence within the range and the basic decision, as to release of the prisoner, was left to the correctional and parole authorities. Concurrent sentencing increased the flexibility available to prison officials to determine prisoners' release dates based on rehabilitation.

By contrast:

> A system of just deserts with an objective of allocational fairness must take the opposite approach. On retributive grounds, two offenses deserve a more severe sanction than one offense. The offender who commits two armed robberies should, all other things being equal, serve more time than the offender who commits one robbery. Concurrent sentences frustrate this objective, and consecutive sentences thus should be the rule in a just desert model.
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> [Perlman and Stebbins, "Implementing an Equitable Sentencing System: The Uniform Law Commissioners' Model Sentencing and Corrections Act," 65 *Va. L. Rev.* 1175, 1220 (1979).]

But the failure to provide guidelines for sentencing judges faced with a choice between consecutive and concurrent sentences "undermines both the objective of fair allocation of punishment and the principle of retribution." *Id.*

at 1221. The problem does not admit of an easy solution: "Offenders who are to be sentenced at one time upon multiple convictions present the just deserts sentencing system with thorny issues." Raymar, "Criminal Dispositions for New Jersey: Pretrial Intervention, the Model Penal Code, and Just Deserts," 8 *Seton Hall L. Rev.* 1, 55 (1976). The multiple-offense problem arises in three common situations.

> First, multiple charges may stem from one incident, as when one possesses and then sells a narcotic drug. At the other extreme, multiple charges may arise from distinct, dissimilar offenses, such as one indictment charging possession of a switchblade, and another charging extortion (without any weapon involved). Third, a single criminal activity may involve multiple and distinct but similar criminal acts, as when one sells narcotic drugs on a number of occasions, perpetrates a series of fraudulent land sales, or extorts money from a number of victims.
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> [*Id.* at 55.][4]

This case presents problems of the second or third variety. The hindering-apprehension charges were distinct and dissimilar to the sexual offenses. The single criminal activity of sexual abuse upon this victim involved multiple and distinct, but similar, criminal acts. We shall focus our consideration primarily upon the form of single criminal activity involving multiple and distinct, but similar, crimi-

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[4] As to the first such issue, the author notes that the merger doctrine may be appropriate for resolution of the problem, citing *State* v. *Best*, 70 N.J. 56 (1976).

nals acts. In this situation, a determination of proportionality and desert is made more complex by the role of prosecuting authorities who have the discretion to choose to prosecute for one or many of such similar offenses. "By accumulating separate counts or offenses a prosecutor can enhance the sentence far beyond what is appropriate or desirable." Model Sentencing and Corrections Act § 3-107 comment (1978), *reprinted in* 10 *U.L.A.* 60 (Supp. 1985) (special supplementary pamphlet). For example, in the case of bookmaking or drug sales, the evidence might disclose thirty or forty betting or drug transactions. Query whether such a criminal is deserving of forty times the punishment of one as to whom the evidence disclosed one or two incidents? Almost all agree that the answer should be no. Not all agree on the solution. That source for a model of sentencing upon which our Code was most closely based posits that it would be senseless "to give the criminal 'free' crimes after a certain number," *Fair and Certain Punishment, supra,* at 27, and suggests that the best solution would be "to devise a sophisticated system in which every additional crime in a series carried an increment of punishment but not the full increment of a consecutive sentence." *Id.* at 27-28. That is an ideal that has not been met in our Code but should provide us with the broad outlines of a solution.

IV

Varied patterns have been developed to channel consecutive-sentencing discretion. The recent "Symposium on Determinate Sentencing," 5 *Hamline L. Rev.* 161 (1982), summarizes the development of such consecutive or concurrent standards.

California and Illinois, for example, have employed statutory methods to channel discretion. California has a complex method of calculating sentence enhancements and the consecutive features of sentences. In broad outline, in the case of violent felonies, California permits the imposition of consecutive sentences upon these requirements: (1) a written record be provided of the reasons for the selection of a particular sentence; (2) the principal term shall consist of the greatest term of imprisonment imposed for any one of the crimes, including any enhancements; and (3) the subordinate term of each consecutive violent felony may include one-third of any enhancements imposed on the first violent crime. *See People* v. *Price,* 151 *Cal. App.* 3d 803, 199 *Cal. Rptr.* 99 (Cal. Ct. App. 1984); *People* v. *Hernandez,* 120 *Cal. App.* 3d 500, 175 *Cal. Rptr.* 22 (Cal Ct. App.), aff'd, 30 *Cal.*3d 462, 179 *Cal. Rptr.* 239, 637 P.2d 706 (1981); *People* v. *Blessing,* 94 *Cal. App.* 3d 835, 155 *Cal. Rptr.* 780 (Cal. Ct. App. 1979).

Illinois has adopted a somewhat simpler procedure than the California method. The actual aggregation of the consecutive sentences is to be performed by the Department of Corrections and shall consist of (1) an aggregate maximum boundary consisting of a combination of all the maximum terms, and (2) an aggregate minimum boundary consisting of a combination of all the minimum terms. "In essence what the process accomplishes is to determine a single upper and lower boundary similar to those prescribed by statute, but with the qualification that the maximum term 'shall not exceed the sum of the maximum terms authorized * * * for the two most serious felonies involved.'" 5 *Hamline L. Rev., supra,* at 385 (citing *Ill.*

Ann. Stat., ch. 38 §§ 1005-8-4(c) and (e) (Smith-Hurd 1980)). Like California, Illinois requires reasons for the imposition of consecutive sentences.

Other jurisdictions have chosen to use sentencing guidelines. Minnesota allows judges substantial discretion in imposing consecutive sentences. The guidelines limit the use of consecutive sentences to multiple-person offenses against different victims and escape offenses, but within that category, consecutive sentences are permissive and require no justification. *See* Minnesota Sentencing Guidelines Commission, *Guidelines and Commentary* 22-25 (1983).

The State of Washington provides sentencing guidelines that recognize that multiple crimes involving at least one violent crime should be treated more severely than multiple-property crimes, but state that uniform application of policies is necessary to avoid disparity in sentencing. Washington's recommended policy is that when there is at least one violent offense and not all offenses arose out of the same act, the sentences be consecutive, but the range of sentence should score the most serious offense by using the prior history of the offender and score the other offenses using a "zero offender's score." This scoring for multiple counts is to avoid double counting of factors. *See Wash. Rev. Code Ann.* § 9.94A.400; Sentencing Guidelines Commission (Wash.), *Report to the Legislature* 15-16 (Jan. 10, 1983).

Other jurisdictions without statutory or commission-adopted guidelines have achieved similar results. Colorado has incorporated the 1968 American Bar Association Stand-

ards For Criminal Justice Relating to Sentencing Alternatives and Procedures. In particular, it concluded that authority to impose consecutive sentences should be circumscribed by the following limitations:

> The aggregate maximum of consecutive terms should not be permitted to exceed the term authorized for an habitual offender * * * for the most serious of the offenses involved. If there is no provision for an habitual offender for the offenses involved, there should be a ceiling on the aggregate of consecutive terms which is related to the severity of the offenses involved * * *
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> [*DeBose* v. *People*, 175 *Colo.* 356, ——, 488 P.2d 69, 71 (1971) (en banc) (citing § 3.4(b)(i) of the ABA Standards).][5]

In the analogous context of multiple offenses within a single criminal episode, Oregon suggests that consecutive sentences are appropriate only when the defendant poses an unusual risk to the safety of the public, and requires the sentencing court to state affirmatively the reasons for

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[5] The 1968 ABA Standards for Criminal Justice were in draft form and have since been approved and incorporated in the second edition ABA Standards for Criminal Justice (1980). Section 3.4 has since been superseded by Standard 18-4.5. (*See* Appendix). The commentary to the Standards states that the revisions are modest and are intended only to provide flexibility for the guidlines drafting agency Subparagraph (b)(i) has been modified to conform with the second edition's withdrawal of support for a separately-authorized extended term for the habitual or dangerous offender, the maximum for which was previously used as the outer limit on the permissible cumulation of sentences.

imposing consecutive sentences. *State* v. *Garcia*, 288 Or. 413, ——, 605 P.2d 671, 681 (1980) (en banc). The reasons must be consistent with the legislative policies concerning proportional sentencing, rehabilitation, deterrence, and protection of the public. *Id.* Without specific statutory authority establishing criteria for effective appellate review of sentences, particularly of the choice between concurrent and consecutive sentences, the Oregon Supreme Court has nonetheless concluded that, "[t]aken together, the legislature's recent enactments reflect[ed] a continuing policy to bring rationality and proportionality to the penal dimension of criminal law, a dimension often marked by haphazard statutory penalties, by a deliberate or fortuitous multiplicity of charges, and by the tactical opportunities these factors offer in plea negotiations." *State* v. *Cloutier*, 286 Or. 579, 594, 596 P.2d 1278, 1286 (1979). It cited with approval the ABA Standards for Criminal Justice incorporated by the Colorado court. *Id.* at 1285-6 n.12.

Tennessee has reached a similar result through the Model Penal Code. It limits consecutive sentencing to:

> (1) the persistent offender, defined as one who has previously been convicted of two felonies or of one felony and two misdemeanors committed at different times when he was over eighteen (18) years of age; (2) the professional criminal, one who has knowingly devoted himself to criminal acts as a major source of livelihood or who has substantial income or resources not shown to be derived from a source other than criminal activity; (3) the mul-

> tiple offender, one whose record of criminal activity is extensive; (4) the dangerous mentally abnormal person, so declared by a competent psychiatrist who concludes as a result of a presentence investigation that the defendant's criminal conduct has been characterized by a pattern of repetitive or compulsive behavior or by persistent aggressive behavior with heedless indifference to consequences; and (5) the dangerous offender, hereinafter defined.
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> [*Gray* v. *State*, 538 S.W.2d 391, 393 (Tenn. 1976) (footnote omitted).]

Tennessee defines a dangerous offender as one who has little or no regard for human life, and no hesitation about committing a crime in which risk to human life is high. *Id.*

The recently-enacted Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 2017, created a commission, the United States Sentencing Commission, to adopt guidlines to be used by sentencing courts in determining the sentence to be imposed in a criminal case. *See* 28 U.S.C.A. § 991 (West 1985 supp.). The Commission is obligated to insure that these guidlines reflect the appropriateness of imposing an incremental penalty for each offense in a case in which a defendant is either convicted of multiple offenses committed in the same course of conduct or multiple offenses committed at different times. The guidlines shall also convey the general unsuitability of imposing consecutive sentences for an offense of conspiring to commit a crime or soliciting commission of a crime

and for an offense that was the sole object of the conspiracy or solicitation. *See* Pub. L. No. 98-473, § 217, 28 U.S.C.A. § 994(1).[6]

These various provisions reflect some of the common concerns expressed in the various models of sentencing reform that have been promulgated over the last two decades. (*See* Appendix). Although varying in content, these disciplines reflect, in whole or in part, the following criteria:

(1) there can be no free crimes in a system for which the punishment shall fit the crime;

(2) the reasons for imposing either a consecutive or concurrent sentence should be separately stated in the sentencing decision;

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[6] Not-yet-enacted provisions dealing with consecutive sentencing are those recommended by the New York State Committee on Sentencing Guidlines. The committee recommended that

> if the aggregate maximum term of consecutive sentences imposed for two or more class B through E felonies exceeds 20 years, the maximum sentence is calculated as 20 years; if one of the sentences imposed is for a class B felony, the maximum term is calculated as no more than 30 years. If the aggregate maximum term of consecutive sentences imposed for two violent felony offenses, one of which was a class B violent felony, exceeds 40 years, it is calculated as 40 years. If the aggregated maximum terms imposed for three or more violent felony offenses, one of which is a class B violent felony offense, exceeds 50 years, it is calculated as 50 years. Class A fellonies have a maximum term of life and are therefore excluded from these statutory restrictions.
>
> [New York State Committee on Sentencing Guidelines, *Determinate Sentencing Report and Recommendations* 30 (March 29, 1985).]

(3) some reasons to be considered by the sentencing court should include facts relating to the crimes, including whether or not:

(a) the crimes and their objectives were predominantly independent of each other;

(b) the crimes involved separate acts of violence or threats of violence;

(c) the crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior;

(d) any of the crimes involved multiple victims;

(e) the convictions for which the sentences are to be imposed are numerous;[7]

(4) there should be no double counting of aggravating factors;

(5) successive terms for the same offense should not ordinarily be equal to the punishment for the first offense; and

(6) there should be an overall outer limit on the cumulation of consecutive sentences for multiple offenses not to exceed the sum of the longest terms (including an extended

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[7] These reasons are suggested by *Cal. R. Ct.* 425, *cited in People* v. *Blessing, supra,* 94 Cal. App. 3d 835, 155 Cal. Rptr. 780.

term, if eligible) that could be imposed for the two most serious offenses.[8]

We adopt these criteria as general sentencing guideline for concurrent or consecutive-sentencing decisions (including any parole ineligibilty feature) when sentence is pronounced on one occasion on an offender who has engaged in a pattern of behavior constituting a series of separate offenses or committed multiple offenses in separate, unrelated episodes. In this case both features are present and the composite sentence for the sexual assaults and hindering counts should be considered within these guidelines. As previously noted, multiple offenses committed in the process of seeking one criminal objective (such as the burglar's guilt of possession of burglary tools, burglary, and possession of stolen property) present additional substantive concerns, *see* Model Sentencing and Corrections Act, *supra*, § 3-107 (Comment), but these principles should aid as well in the fashioning of such sentences.

V

Applying these standards to this case prompts us to remand. Our analysis of the sentencing transcripts leads

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[8] In New Jersey, had an extended term been available for this sexual offense, it could have been between twenty years and life, with a possible twenty-five-year parole disqualifier. N.J.S.A. 2C:43-7. The presumed extended term is 50 years. N.J.S.A. 2C:44-1f. *See State* v. *Guzman*, 199 N.J. Super. 346; 350 (Law Div. 1985). Only one extended term can be imposed in a multiple-sentencing proceeding. N.J.S.A. 2C:44-5a. (2); *State* v. *Chavies*, 185 N.J. Super. 429, 431 (App. Div. 1982).

us to agree with the Appellate Division that certain of the factors that the trial court used in its decision whether to make the sentences consecutive were, in part, the same factors that the Legislature has invoked to establish the very degree of the crime, for example, the nature of the crime and the age of the victim. We are not without understanding that the loathesome nature of these offenses be found reflected in the court's sentence. As the trial court stated on remand:

> The crime to me is the most aggravating of all aggravating factors. Words fail me to express on record the actual chagrin I felt as a human being hearing and witnessing the depiction of rape of a child by a man three times her age, with support of that child's mother.
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> * * *
>
> To me the enormity of that crime committed by not mentally defective people, but by people as I recall who had the benefit—what most of us hope that we can have of family upbringing and a decent education. To me, as I said, it was the most aggravating of all aggravating factors.

Indeed, it is that very enromity of moral reproach that makes the crime one of the first degree. *See State* v. *Link*, 197 N.J. Super. 615, 620 (App. Div. 1984) (where an essential element of a crime is a specific fact, that element may not be used as an aggravating factor to impose a custodial sentence that is longer than the presumptive term or to impose parole ineligibility); *People* v. *Price, supra*, 151 *Cal. App.* 3d 803, 199 *Cal. Rptr.* 99 (the same fact may not

be used to establish both upper terms of sentence and full-force consecutive sentences). Concededly, since the age of the victim alone makes the crime one of the first degree, it is appropriate to consider the relationship between the parties as an aggravating factor in determining whether to impose a maximum sentence for a first-degree crime. *See* N.J.S.A. 2C:44-1a.

By the same token, we believe that a sentencing court could, within the guidelines that we have established, conclude that each of the sexual offenses and each of the hindering offenses posed a distinct and different danger to the victim for which separate punishment would be warranted. Those separate, consecutive punishments would ordinarily not be graded at the maximum range; they would typically not exceed in aggregate duration, except for an habitual offender, the longest term for the two most serious offenses. In fashioning such a sentence, the court will be conscious that "though a defendant's conduct may have constituted multiple offenses, the sentencing phase concerns the disposition of a single, not multiple, human being." *State* v. *Cloutier,* 286 Or. 579, ——, 596 P.2d 1278, 1284 (1979). Thus, in molding that consecutive sentence, the court will normally make an overall evaluation of the punishment for the several offenses involved, *State* v. *Rodriguez,* 97 N.J. 263, 274 (1984), reflecting that its goal is not an exercise "whose object is to find the maximum possible period of incarceration for a convicted defendant." *People* v. *Price, supra,* 151 *Cal. App.* 3d at 822, 199 *Cal. Rptr.* at 109.

As noted, our review of the sentencing proceedings below discloses that, because the standards we have defined today

were not evident before our decision, they were not followed in this case by the trial court or the Appellate Division. Accordingly, we conclude that the matter should be remanded for resentencing. Because of this case's long history, it is best that this resentencing be done anew by a court not previously committed to a sentence imposed under different standards. Sentencing, although requiring the most sensitive exercise of guided discretion under the Code, does not require the same in-court experience that weighing credibility or demeanor does. Defendants such as these, although not deserving of society's pity, must be sentenced in accordance with law "after reflection and with a sense of proportionality." *People* v. *Price, supra,* 151 *Cal. App.* 3d at 822, 199 *Cal. Rptr.* at 109 (citing ABA Standards for Criminal Justice, Standard 18-3.2 (1980)). The gravity of these offenses has been established by the jury's verdict. The independent aggravating factors are set forth in the record. The presence or absence of mitigating factors may be derived from the presentence reports. Accordingly, we remand the case to the Superior Court, Law Division, for further proceedings.

We recognize that even within the general parameters that we have announced there are cases so extreme and so extraordinary that deviation from the guidelines may be called for. Still, we believe that must strive for some degree of proportionality. *Fair and Certain Punishment, supra,* is not just the title of a book. It is a goal that we have pursued continuously for over fifty years in New Jersey. *See State* v. *Poteet,* 61 N.J. 493, 500-01 (1972) (Jacobs, J., concurring); *State* v. *Johson,* 67 N.J. Super. 414, 429 (App. Div. 1961). We repose the paramount re-

sponsibility for fair and certain sentencing justice in our trial courts. They share the goal of our appellate courts that there be a predictable degree of uniformity in sentencing. Much remains to be done to attain that goal at all levels of the judiciary. It is a goal that we shall continue to seek. We believe that the standards we outline today will aid in that pursuit.

In this case, for the reasons stated, the case is remanded to the trial court for further proceedings in accordance with this opinion. Jurisdiction is not retained.

Chief Justice Wilentz and Justices Clifford, Handler, Pollock, Garibaldi and Stein join in this opinion.

APPENDIX

Model Sentencing and Corrections Act (U.L.A. 1978), *reprinted in* Supplementary Pamphlet to 10 U.L.A. (1985)

§ 3-107. [Concurrent and Consecutive Sentences.]

(a) If multiple sentences are imposed on a defendant or if a sentence is imposed on a defendant already subject to an undischarged sentence, the sentences shall run consecutively; but the sentences shall run concurrently if (1) they are imposed for 2 or more offenses committed as part of a single course of conduct during which there was no substantial change in the nature of the criminal objective; or (2) one of the acts constituting a separate offense is taken into account to enhance a sentence on the other offense.

(b) Notwithstanding subsection (a), a sentence when combined with all other undischarged sentences and remaining undischarged parts of prior sentences, may not exceed twice the maximum term of the most serious offense involved. The phrase "the maximum term of the most serious offense" as used in this subsection means the statutory maximum term of the offense carrying the longest maximum term, but does not include the additional term that could be imposed on a persistent offender or for an especially aggravated offense.

(c) Notwithstanding subsection (b) a sentence imposed on a defendant for an offense committed while serving a sentence of continuous confinement for a prior offense shall run consecutively to the remaining part of the sentence for the prior offense.

(d) In all cases in which consecutive sentences are imposed the sentencing court shall direct that the sentence most restrictive of the person's liberty shall be served first.

COMMENT

The traditional approach to multiple sentences taken in sentencing systems based in part on rehabilitative purposes has been to establish a presumption in favor of concurrent sentencing. Concurrent sentences greatly facilitate the exercise of parole discretion. In a sentencing system that focuses primarily on the offense, consecutive sentencing for multiple offenses is required. On the other hand, requirements for consecutive sentences can greatly enhance the impact of the prosecutor's charging discretion on the sentence imposed. By accumulating separate counts or offenses a prosecutor can enhance the sentence far beyond what is appropriate or desirable. This section seeks to reach an accomodation on this difficult question.

* * *

Model Penal Code

(ALI, Proposed Official Draft 1962), *reprinted in* 10 U.L.A. 433-668 (Master edition).

§ 7.06. Mutiple Sentences; Concurrent and Consecutive Terms

(1) Sentences of Imprisonment for More Than One Crime. When multiple sentences of imprisonment are im-

posed on a defendant for more than one crime, including a crime for which a previous suspended sentence or sentence of probation has been revoked, such multiple sentences shall run concurrently or consequently as the Court determines at the time of sentence, except that:

(a) a definite and an indefinite term shall run concurrently and both sentences shall be satisfied by service of the indefinite term; and

(b) the aggregate of consecutive definite terms shall not exceed one year; and

(c) the aggregate of consecutive indefinite terms shall not exceed in minimum or maximum length the longest extended term authorized for the highest grade and degree of crime for which any of the sentences was imposed; and

(d) not more than one sentence for an extended term shall be imposed.

* * *

[Under § 7.03, the Court may sentence a person who has been convicted of a felony to an extended term of imprisonment if the Court determines that a defendant is a persistent offender, professional criminal, a dangerous and mentally abnormal person, or a multiple offender whose criminality was so extensive that a sentence of imprisonment for an extended term is warranted. The justification for a defendant to receive an extended term is that it is necessary for protection of the public.]

ABA, *Standards for Criminal Justice: Sentencing Alternatives and Procedures* (1980)

Standard 18-4.5. Multiple offenses: same state; concurrent and consecutive terms

(a) After convictions of multiple offenses which are separately punishable or in cases where the defendant is serving a prison sentence at the time of conviction, the extent, if any, to which sentences are made to run consecutively rather than concurrently should be left to the discretion of sentencing authorities.

(b) Consecutive sentences should not routinely be imposed. Authority to impose a consecutive sentence should be circumscribed by the following limitations:

(i) There should be a ceiling on the aggregate maximum of consecutive terms which is reasonably related to the severity of the offenses involved;

(ii) The aggregate minimum of consecutive terms should be governed by the limitations stated in standard 18-4.3 [provisions for dealing with indeterminate and flat-time sentences];

(iii) The court should not be authorized to impose a sentence which is consecutive in whole or part to any other sentence until a presentence report (standards 18-5.1 to 18-5.5), supplemented by a report of the examination of the defendant's mental, emotional, and physical condition (standard 18-5.6), has been obtained and considered;

(iv) Imposition of a sentence which is consecutive in whole or in part to any other sentence should require the affirmative action of the sentencing court. The court should be authorized to impose such a sentence only after a finding that confinement for such a term is necessary in order to protect the public from further serious criminal conduct by the defendant; and

(v) The guideline drafting agency should be required to address the question of when consecutive sentences should be prohibited because of the relationship between multiple offenses.

These limitations should also apply to any sentence for an offense committed prior to the imposition of sentence for another offense, whether the previous sentence for the other offense has been served or remains to be served.

(c) Corrections and parole authorities should be directed to consider an offender committed under multiple sentences as though the offender had been committed for a single term whose limits were defined by the cumulative effect of the multiple sentences.

§ 3204 Proposed Federal Criminal Code, *reprinted in, Final Report of the National Commission on Reform of Federal Criminal Laws* 291-92 (1971)

* * *

(3) Maximum Limits Where Felony Involved. The aggregate maximum of consecutive sentences to which a defendant may be subject shall not exceed the maximum term

authorized by section 3201(1) for the most serious felony involved, except that a defendant being sentenced for two or more Class C felonies may be subject to an aggregate maximum not exceeding that authorized by section 3201(1) for a Class B felony if each Class C felony was committed as part of a different course of conduct or each involved a substantially different criminal objective [and a defendant being sentenced for two or more Class B felonies may be subject to an aggregate maximum not exceeding that authorized by section 3201(1) for a Class A felony if each Class B felony was committed as part of a different course of conduct or each involved a substantially different criminal objective].

* * *

Opinion of the Superior Court of New Jersey, Appellate Division

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JOHN YARBOUGH and JUDY WILSON SMITH, a/k/a JUDY YARBOUGH,

Defendants-Appellants.

Argued March 7, 1984—Remanded May 8, 1984.

Reargued June 28, 1984—Decided July 16, 1984

Before Judges Matthews, Gaulkin and Shebell.

Richard J. Kaplow argued the cause for appellants (*Weinberg & Manoff*, P.A., attorneys).

Jane A. Grall, Deputy Attorney General, argued the cause for respondent (*Irwin I. Kimmelman,* Attorney General, attorney).

The opinion of the court was delivered by
Gaulkin, J.A.D.

Opinion of the Superior Court of New Jersey, Appellate Division

By opinion of May 8, 1984,[1] we affirmed the convictions of defendants John Yarbough and Judy Wilson Smith but remanded the matter for reconsideration of sentence in light of *State* v. *Hodge*, 95 N.J. 369 (1984), and *State* v. *Roth*, 95 N.J. 334 (1984). We retained jurisdiction and now must review the sentences imposed on the remand.

Both Yarbough and Smith were found guilty of three counts of first-degree aggravated sexual assault (N.J.S.A. 2C:14-2) upon Smith's 11 year old daughter Kimberly, and four counts of third-degree hindering apprehension by concealment and by giving false information (N.J.S.A. 2C:29-3(a)(3), (7); N.J.S.A. 2C:29-3(b)(1), (4)).[2] The Adult Diagnostic and Treatment Center found that neither defendant came "under the purview of the New Jersey Sex Offender Act." See N.J.S.A. 2C:47-3. Yarbough was initially sentenced on the aggrevated sexual assault convictions to three consecutive 20 year terms, each with a 10 year parole ineligibility period. On the hindering apprehension by concealment convictions he was sentenced to 4 year terms, each with 2 years of parole ineligibility, to be served consecutive to each other and to the aggravated sexual assault sentences; on the false information convictions he was given concurrent 4 year terms, with 2 years of parole ineligibility. His sentences thus aggregated 68 years with 34 years of parole ineligibility.

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[1] Judge Matthews did not participate in that phase of the appeal.

[2] Each defendant was also found guilty of two counts of conspiracy and three counts of endangering the welfare of Kimberly; those convictions were merged at sentencing. Charges of possession and use of a firearm were dismissed during trial.

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Smith was sentenced on her aggravated sexual assault convictions to three consecutive custodial terms of 15 years, each with 7 years of parole ineligibility; on each of the remaining convictions she was sentenced to a 4 year term, with 2 years of parole ineligibility, all concurrent with each other and with the aggrevated sexual assault sentences. Accordingly, her sentences aggregated 45 years with 21 years of parole ineligibility.

At the hearing on remand, the trial judge initially concluded that "what I did was right." After a short recess and "just to make sure that the ends of justice are served" he said he would modify Yarbough's sentence by reducing the first aggravated assault sentence to 15 years with 7 years of parole ineligibility, thus reducing the aggregate sentence to 63 years with 31 years of parole ineligibility. But because the defendants were not then in court, the judge deferred resentencing.

In resentencing Yarbough a week later, the judge imposed a 15 year custodial term with 5 years of parole ineligibility on the first aggravated sexual assault conviction; as to Smith he imposed a 15 year custodial term with 5 years of parole ineligibility on the first aggrevated sexlau assault conviction. The original sentences were otherwise not disturbed.

Yarbough thus stands sentenced to a total of 63 years with 29 years of parole ineligibility and Smith to a total of 45 years with 19 years of parole ineligibility. Both defendants challenge those sentences as excessive.

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I.

[1] Our review of the sentences requires that we determine (1) whether the legislatively fixed sentencing guidelines were followed, (2) whether the aggravating and mitigating factors found below were based upon competent, credible evidence in the record and (3) whether application of the guidelines to the facts of this case makes the sentences clearly unreasonable so as to shock the judicial conscience. *State* v. *Roth, supra*, 95 N.J. at 363-64, 365-66. We find both sentences vulnerable under each of these tests.

The sentencing guidliness fixed in the Code of Criminal Justice (Code) are clear. A presumptive sentence of 15 years applies to each conviction for first-degree aggrevated sexual assault; a 4 year presumptive sentence applies to each conviction for third-degree hindering apprehension and giving false information. N.J.S.A. 2C:44-1(d), (f)(1); N.J.S.A. 2C:44-5(f)(1). Only upon a finding of "preponderance of aggravating factors or preponderance of mitigating factors"(N.J.S.A. 2C:44-1(f)(1); see N.J.S.A. 2C:44-1(a), (b)) could the judge impose a sentence, other than the presumptive sentence, of not less than 10 years and not more than 20 years for the first-degree offenses and not less than 3 nor more than 5 years for the third-degree offenses. N.J.S.A. 2C:43-6(a)(1), (3). The judge could also impose parole ineligibility terms, but only if he was "clearly convinced" that aggrevating factors "substantially outweigh[ed]" mitigating factors. N.J.S.A. 2C:43-6(b).

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The record does not persuade us that the trial judge recognized or applied these principles. Before his original sentencing of Yarbough, the judge merely characterized Yarbough's crimes as "lecherous, debasing, vile, debauchery of an 11 year old child," "obscene criminality" and the like and said that "the severity of your crime demands that you be given the ultimate punishment . . . ." After imposing the sentences, the judge supplemented his statement of reasons as follows:

> What I have done frankly is to punish you to the extent of making sure you shall spend the same period of time that you are presently on this earth in jail as punishment for what you have scarred an 11 year old for permanently. You should spend 34 years in jail before you shall be eligible for parole. And as I said before I have no hesitation in assessing that penalty and punishment against you.

Before sentencing Smith, the trial judge was only marginally more explanatory. He characterized her crimes as "the repeated rapes of your own blood" and "one of the most reprehensible crimes that anyone can know . . . ." Because the crimes evidenced "insensitivity" to Smith's parental responsibilities, the judge found that "the fact that you have no criminal background really has no relevance in what I shall do by way of sentencing." The judge also inferred that "the injuries inflicted upon your daughter were not only physical but psychological and . . . she will probably, bear the scars for a long time if not for

the rest of her life." after imposing sentence, the judge gave the following reasons:

> I have done what I have done because I have said you willing permitted almost an unatural act. You have destroyed your role as mother in destroying your daughter. And for that you have to be punished. Rehabilitation, you are beyond rehabilitation in that context. Therefore, you should be punished.

On the remand, the trial judge engaged counsel in a lengthy colloquy about *Roth* and *Hodge* and the statutory criteria there discussed. But in ruling on the motion for reconsideration, he again did little more than characterize what the jury had found. He said that defendants had "raped [the] child," that they "had actively conspired" to do so and that they also "conspired to and did seek to hinder the prosecution . . . ." He concluded that if Yarbough were not incarcerated he would continue "those predatory ways upon another young child"; as to Smith, the judge said only that "in my opinion that mother forfeited her right to be a mother." His announced determination to reimpose the sentences originally fixed was because "[t]he crime to me is the most aggrevating of all aggravating factors." Although the judge later amended the sentences slightly, he did not give any further reasons except that he was giving each defendant "the benefit" of the "presumptive" sentence for the first criminal act.

[2] Only by the most indulgent reading of the record, then, can we infer that the trial judge even addressed the

aggravating and mitigating factors specified in N.J.S.A. 2C:44-1(a) and (b). Neither in the orginal sentencing nor on remand did he purport to weigh aggravating and mitigating factors as a predicate for extending the presumptive terms; nor did he consider whether aggravating factors substantially outweighed mitigating factors so as to justify minimum parole ineligibility terms.[3]

The problem is not merely that the trial judge failed to intone the right words to justify his sentences. Clearly the most significant determinant of the sentences was his view of the nature of the crimes. The intensity of his personal revulsion is dramatically expressed throughout the sentencing transcripts. Those feelings of outrage are understandable, but they cannot be permitted to displace the guidelines of the Code, which are designed to permit deviation from presumptive terms "only within certain strictures." *Roth, supra,* 95 N.J. at 359.

The Legislature has designated as first-degree aggravated sexual assault any sexual penetration of a child under 13 years of age. N.J.S.A. 2C:14-2(a)(1). Such a crime, the Legislature has determined, presumptively calls for a 15 year custodial sentence without any period of parole ineligibility. N.J.S.A. 2C:44-1(f)(1). It we infer

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[3] At the resentencing the trial judge described as "presumptive" sentences the amended 15 year sentence, each with 5 years of parole ineligibility, he imposed for the first sexual assault. Since the judge did not make any findings in support of those terms, we may infer that he regarded that parole ineligibility terms can be attached to presumptive terms as a matter of course. Such a view is clearly erroneous. See *Roth, supra,* 95 N.J. at 359.

from the trial judge's comments that he found the "nature and circumstances of the offense" to be an aggravating factor (N.J.S.A. 2C:44-1(a)(1)), we must also recognize that the circumstances he articulated were essentially those which led the Legislature to categorize defendants' acts as first-degree crimes. The aggravating and mitigating factors recited in N.J.S.A. 2C:44-1 are intended to afford a flexible, but limited, range of sentences based upon individual circumstances which distinguish the particular offense from other crimes of the same nature. If we are to attain " a predictable degree of uniformity in sentencing" (*Hodge, supra,* 95 N.J. at 379), we cannot permit a sentencing judge's personal attitude about a given kind of crime to justify his deviation from the presumptive sentence fixed by the Legislature.

We might also infer that the trial judge found as aggravating factors that the sexual assaults involved victimization of an 11 year old child (N.J.S.A. 2C:44-1(a)(2)), that sexual assaults on 11 year old children require deterrence (N.J.S.A. 2C:44-1(a)(9) or that any lesser sentence would depreciate the seriousness of such offenses (N.J.S.A. 2C:44-1(a)(4)). But such findings can apply to all first-degree sexual assaults under N.J.S.A. 2C:14-2(a)(1); in the absence of some articulation of particular differentiating elements of the present offenses, we cannot know whether the trial judge in fact found any aggravating factors or, if he did, whether they are adequately based in the record.

The failure of the trial judge to articulate and weigh aggravating and mitigating factors thus leaves us without

any sound basis to find affirmatively that he followed the Code guidelines; and, since we do not know what factors he relied on, we surely cannot determine whether there is competent credible evidence in the record to support them. But we do find that both sentences are clearly unreasonable so as to shock our conscience.

[3, 4] The maximum sentence permitted under the Code for first-degree aggravated sexual assault is 20 years with 10 years of parole ineligibility. That sentence was, as to Yarbough, almost tripled, and as to Smith, almost doubled, by the imposition of consecutive sentences. To be sure, a defendant can lawfully be charged, convicted and sentenced for multiple crimes committed in a continuous course of conduct. *State* v. *Vance,* 112 N.J. Super. 479, 481 (App. Div. 1970), certif. den. 58 N.J. 97 (1971); *State* v. *Cox,* 101 N.J. Super. 470, 475 (App. Div. 1968), certif. den. 53 N.J. 510 (1969). It is also true that the Code does not establish any guidelines which restrict the court's discretion in imposing consecutive sentences.[4] *Cf. State* v. *Maxey,* 42 N.J. 62 (1964); see also *State* v. *Serrone,* 95 N.J. 23 (1983). But "judges must exercise careful, common sense discretion in imposing punishment for . . . multiple offenses in order to ensure that the pyamiding of sentences does not offend notions of fairness or cruel and unusual punishment." *State* v. *Juliano,* 52 N.J. 232, 236 (1968). The aggregate sentences must bear a reasonable relationship to the total course of conduct.

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[4] N.J.S.A. 2C:44-5(a) provides that "multiple sentences shall run concurrently or consecutively as the court determines at the time of sentence. . . ." Recent amendments to this section have not alter this particular provision. See L. 1983, c. 462, §1.

[5, 6] A cumulation of multiple sentences is appropriate where a defendant's repeated criminality evidences an enhanced risk to the safety of the public. See *ABA Project on Standards for Criminal Justice*, "Standards Relating to Sentencing Alternatives and Procedures," § 3.4 (Approved Draft 1968). Consecutive sentences in such a setting would have a function comparable to the extended terms authorized by N.J.S.A. 2C:44-3(a) and (b) for persistent offenders and professional criminals. Multiple sentences should not be endlessly cumulated, however, just because a single course of conduct can be fractioned into a number of separate crimes. "Standards Relating to Sentencing Alternatives and Procedures," *supra*, § 3.4(b), comment c.

Defendants were convicted of three sexual assaults which occurred between February and August 1982. Those offenses were presented to the jury in three counts because the child could specifically recall the first and last assaults and also testified that other assaults occurred "a lot of time" in between. Surely the repetitive nature of the assaults should play a significant role in the sentencing decision. But each repetition of the assault does not justify a separate and additional penalty. Not only is it entirely fortuitous how many individual events can be proved, but more importantly each repetition of the offense cannot be said to evidence a further criminal purpose or an enhanced criminal risk warranting a full measure of additional penalty.

[7] The defendants' initial assault established both their criminal purpose and the risk that they presented to the

child. The repetitions of that act represents a confirmation rather than an expansion of that criminal purpose and risk. In that setting, consecutive sentences which double and triple the sanction for a single first-degree aggravated sexual assault are disproportionate to the course of conduct. Nor is there anything in defendants' prior history to justify such a pyramiding of sentences. Yarbough's prior record is somewhat unclear, but his presentence report discloses only a six month supervisory term for battery and "mob action" in Illinois; Smith has no prior criminal record.

We requested the Administrative Office of the Courts to compile records of recent sentences in comparable cases. Those records disclose that 38 persons were sentenced in 1983 for first-degree aggravated sexual assault where the victim was 13 years old or less. In 31 of those cases, multiple assaults had apparently occurred, yet in only 3 were multiple convictions entered; only in the present case were consecutive sentences imposed for separate assaults on the same victim. Moreover, of the 38 persons thus sentenced only 12, including Yarbough and Smith, were given parole ineligibility terms; with one exception, the other parole ineligibility terms were less than 10 years. The one excepted person was convicted of three separate rapes of two young children to whom he was a stranger; his conduct was found to be "characterized by a pattern of repetive, compulsive behavior" (N.J.S.A. 2C:47-3(a)) and he was sentenced to a 25 year parole ineligibility term.

Sentences imposed in other cases are of course, not a certain guide since the circumstances framing each sentence are unique. But in the effort to assure a predicable degree of uniformity in sentencing (*Hodge, supra,* 95 N.J. at 379), we ought to consider the evidence of sentencing patterns available to us. *Cf. Solem* v. *Helm,* 463 U.S. 277, 103 S. Ct. 300, 77 L. Ed. 2d 637 (1983). That evidence confirms our view that the aggregate sentences here are unreasonable and excessive.

II.

Since we have already once asked the trial judge to reconsider the sentences, it would be inappropriate to ask him to do so again. We have thoroughly reviewed the record of the trial court proceedings as well as the presentence reports and accordingly shall exercise our original jurisdiction to resentence. R. 2:10-5; see N.J.S.A. 2C:44-7.

(a) John Yarbough

[8] Each of the three first-degree aggravated sexual assault convictions carries a presumptive 15 year sentence. N.J.S.A. 2C:44-1(f)(1). We are clearly convinced, however, that the aggravating factors substantially outweigh the mitigating factors so as to warrant both enhanced sentences and parole ineligibility terms for those crimes. Each of the assaults involved an act of vaginal intercourse; Yarbough used force and threats of force against a child incapable of exercing normal powers of resistance;

he also grossly misused and took advantage of his in loco parentis role; each assault unquestionably caused additional harm and the aggregate harm to the child was grave and serious. See N.J.S.A. 2C:44-1(a)(1), (2) and (4). The only mitigating factor is that defendant has no significant history of prior unlawful activity. N.J.S.A. 2C:44-(1)(b)(7). But that factor is of little significance in light of the persistent victimization of the child.

[9] The four convictions for hindering prosecution and giving false reports represents an entirely distinct and further course of criminal activity by Yarbough. Each of those offenses carries a presumptive term of 4 years. But again the aggravating factors substantially outweigh the mitigating factors. Yarbough hid the child from law enforcement and social agencies which sought her protection; given the treatment the child had already received at his hands, that conduct carried with it a profound risk of harm; moving and hiding the child was a further corruption of his loco parentis role and a further victimization of a vulnerable child. See N.J.S.A. 2C:44-1(a)(1), (2) and (4). Again, the absence of a prior record does not weigh heavily against that showing.

[10] Based upon that weighing of aggravating and mitigating factors, we sentence Yarbough to the custody of the Commissioner of the Department of Corrections for the following terms:

Count III: Aggravated sexual assault (N.J.S.A. 2C:14-2). A term of 20 years with a minimum of 10

years during which defendant shall not be eligible for parole.[5]

Count V: Aggravated sexual assault (N.J.S.A. 2C: 14-2). A term of 20 years with a minimum term of 10 years during which defendant shall not be eligible for parole, to be served concurrently with the sentence imposed on Count III.

Count VII: Aggravated sexual assault (N.J.S.A. 2C:14-2). A term of 20 years, with a minimum term of 10 years during which defendant shall not be eligible for parole, to be served concurrently with the sentences imposed on Counts III and V.

We impose concurrent sentences on these three convictions for the reasons expressed earier in this opinion.

Count XII: Hindering apprehension (N.J.S.A. 2C: 29-3(a)(3). A term of 4 years, with a minimum term of 2 years during which defendant shall not be eligible for parole, to be served consecutive to the sentences imposed on Counts III, V and VII.

Count XIII: Hindering apprehension (N.J.S.A. 2C: 29-3(b)(1), A term of 4 years, with a minimum term of 2 years during which defendant shall not be eligible for parole, to be served concurrently with the sentence imposed on Count XII.

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[5] We find no bar to this reimposition of the original sentence, which had been reduced by the trial judge on the remand. See *State v. Giorgianni*, 189 N.J. Super. 220 (App. Div.), certif. den. 94 N.J. 569 (1983).

Count XIV: Giving of false information (N.J.S.A. 2C:29-3(a)(7). A term of 4 years, with a minimum term of 2 years during which defendant shall not be eligible for parole, to be served concurrently with the sentences imposed on Counts XII and XIII.

Count XV: Giving of false information (N.J.S.A. 2C:29-30(b)(4)). A term of 4 years, with a minimum term of 2 years during which defendant shall not be eligible for parole, to be served concurrently with the sentences imposed on Counts XII, XIII and XIV.

We impose concurrent sentences on these four convictions because they represent essentially different facets of a single and brief course of conduct; but we have made them consecutive to the aggravated assault sentences because, as we have already said, they evidence a different and further criminal purpose, risk and harm.

(b) Judy Wilson Smith

[11] Smith was convicted of aiding and abetting Yarbough in committing the aggravated sexual assaults. Each of the aggravated factors we have identified with respect to Yarbough is equally applicable to Smith and the only mitigating factor is the absence of any prior history of delinquency or criminal activity. Accordingly we are again clearly convinced that the aggravating factors substantially outweigh the mitigating factors; however, Smith's secondary role in initiating and perpetrating the crimes justifies the imposition of somewhat lesser sentences than those imposed on Yarbough.

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With respect to the four convictions for hindering prosecution and giving false reports, on the other hand, Smith's involvement and culpability are no different than Yarbough's. The aggravating factors are those we have found for Yarbough and we again find that they substantially outweigh in significance the one mitigating factor, the absence of any prior criminal history.

Based upon that evaluation of aggrevating and mitigating factors, we sentence Smith to the custody of the Commissioner of the Department of Corrections for the following terms:

> *Count III*: Aggravated sexual assault (N.J.S.A. 2C: 14-2). A term of 15 years with a minimum term of 5 years during which defendant shall not be eligible for parole.
>
> *Count V*: Aggravated sexual assault (N.J.S.A. 2C: 14-2). A term of 15 years, with a minimum term of 5 years during which defendant shall not be eligible for parole, to be served concurrently with the sentence imposed on Count III.
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> *Count VII*: Aggravated sexual assault (N.J.S.A. 2C:14-2). A term of 15 years, with a minimum term of 5 years during which defendant shall not be eligible for parole, to be served concurrently with the sentences imposed on Counts III and V.

We impose concurrent sentences on these three convictions for the reasons expressed earlier in this opinion.

Count XVI: Hindering apprehension (N.J.S.A. 2C: 29-3(a)(3)). A term of 4 years, with a minimum term of 2 years during which defendant shall not be eligible for parole, to be served consecutive to the sentences imposed on Counts III, V and VII.

Count XVII: Hindering apprehension (N.J.S.A. 2C: 29-3(b)(1)). A term of 4 years, with a minimum term of 2 years during which defendant shall not be eligible for parole, to be served concurrently with the sentence imposed on Count XVI.

Count XVIII: Giving of false information (N.J.S.A. 2C:29-3(a)(7)). A term of 4 years, with a minimum term of 2 years during which defendant shall not be eligible for parole, to be served concurrently with the sentences imposed on Counts XVI and XVII.

Count XIX: Giving of false information (N.J.S.A. 2C:29-3(b)(4)). A term of 4 years, with a minimum term of 2 years during which defendant shall not be eligible for parole, to be served concurrently with the sentences imposed on Counts XVI, XVII and XVIII.

We impose concurrent sentences on these four convictions, and we make them consecutive to the aggravated sexual assault sentences, for the same reasons we have expressed in sentencing Yarbough.

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The sentences are thus amended to impose, as to Yarbough, an aggregate of 24 years with 12 years of parole ineligibility and, as to Smith, 19 years with 7 years of parole ineligibility. We regard those sentences to represent appropriate sanctions for the total course of conduct engaged in by defendants.

The judgment of conviction is amended as herein set forth. The matter is remanded to the Law Division for entry of an appropriate amended judgment.